



FMLA, ADA & MENTAL HEALTH ISSUES



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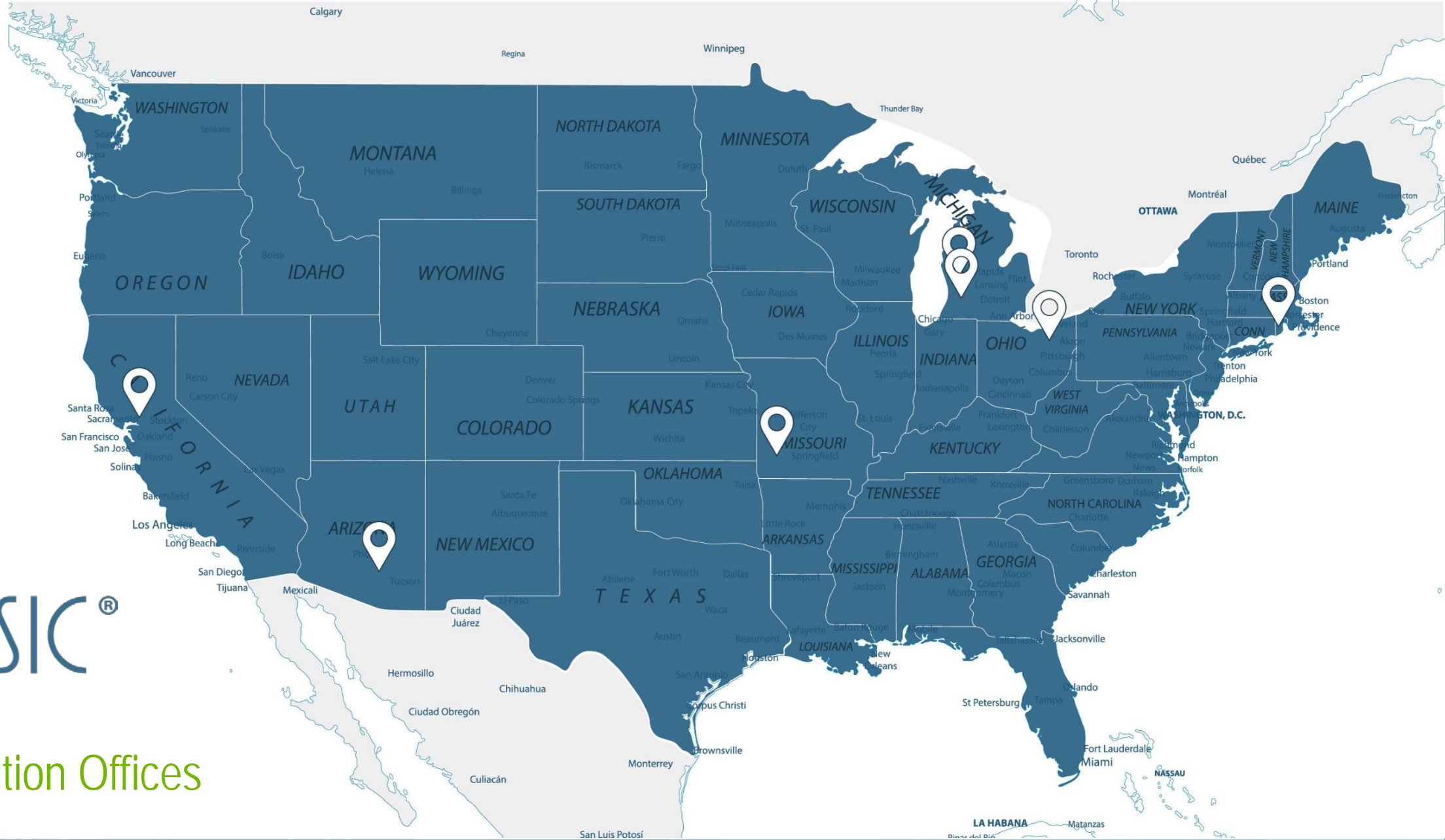
PRESENTED BY:



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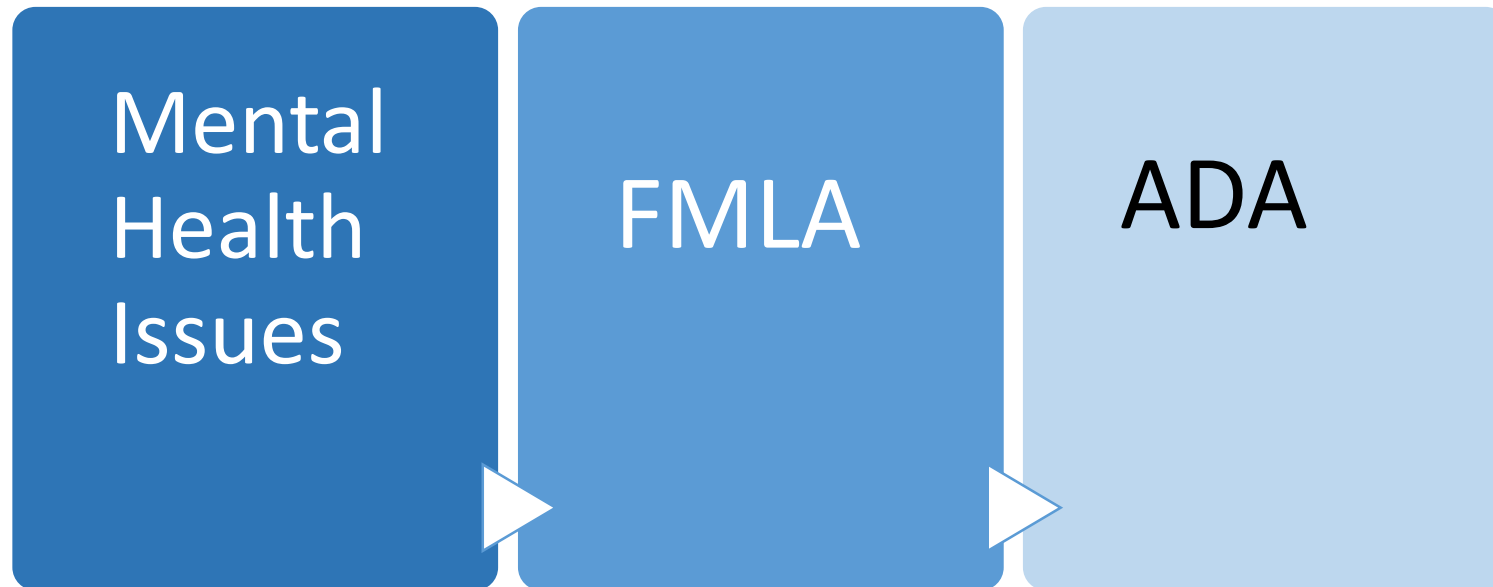
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➤ Introduction



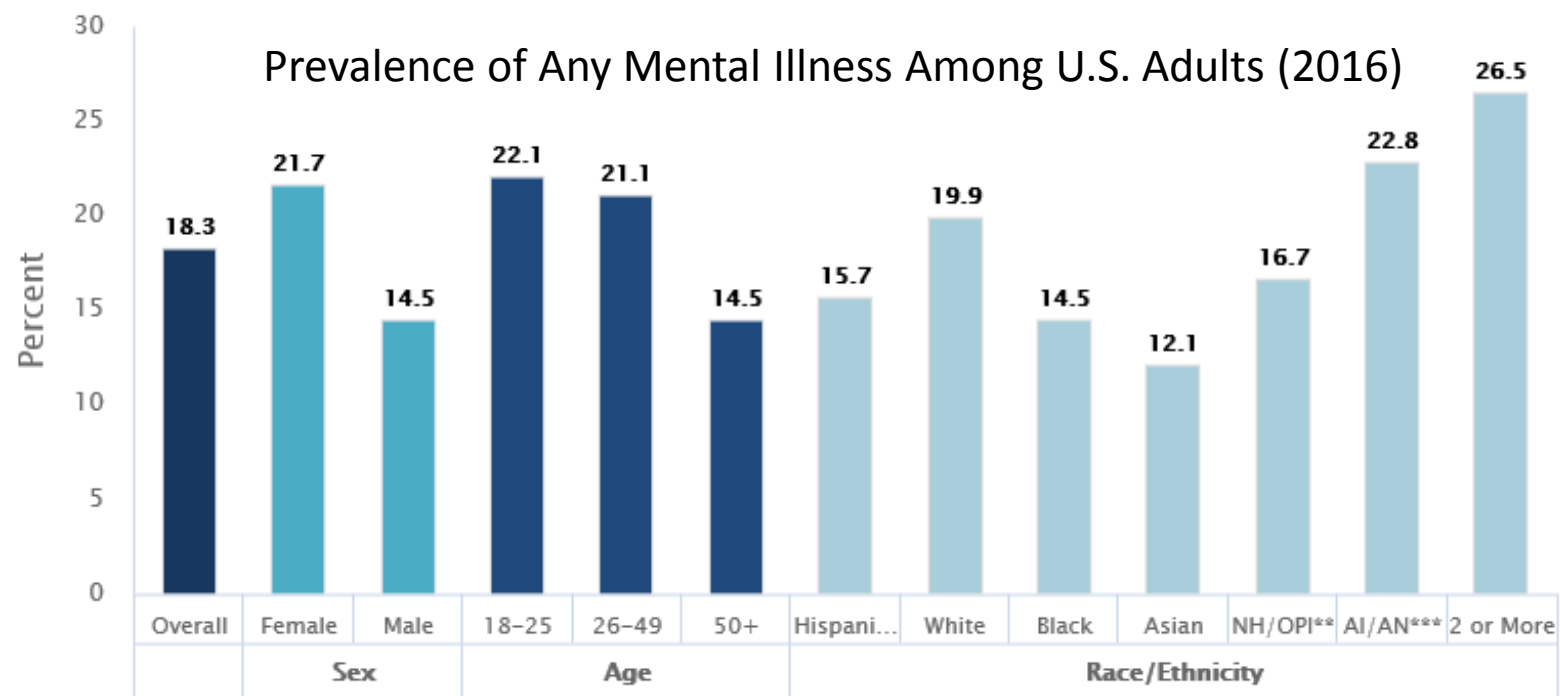
➤ Mental Health Issues



➤ Mental Health in the Workplace

- World Health Organization estimates that depression and anxiety cost the global economy \$1 trillion each year in lost productivity
- Globally, more than 300 million people suffer from depression
 - Leading cause of disability
 - Many also suffer from anxiety and/or PTSD

➤ Mental Illness Statistics



*All other groups are non-Hispanic or Latino | **NH/OPI = Native Hawaiian / Other Pacific Islander
 ***AI/AN = American Indian / Alaskan Native

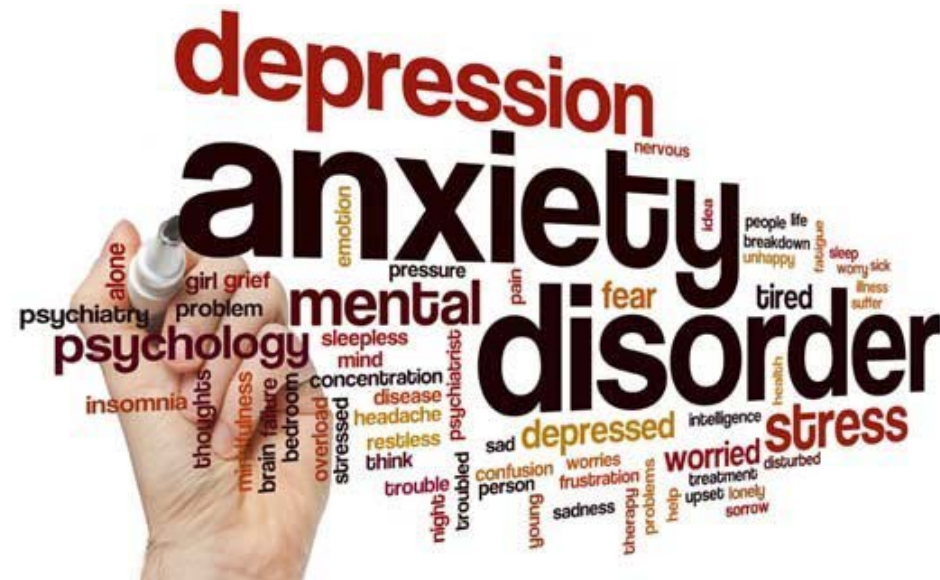
➤ Mental Illness Statistics (cont'd)



- 44.7 million Americans have some form of mental illness (18.3%)
- 10.4 million adults have a serious mental illness (4.2%)
- 64.8% of individuals with a serious mental illness received treatment in 2016

➤ Common Mental Health Illnesses

- Anxiety Disorder
- PTSD
- Major Depression
- Bipolar Disorder
- Schizophrenia



➤ Anxiety Disorder

- Most common mental illness
- 40 million adults (18%)
- Excessive fear and worry that is difficult to control
 - Causes significant distress or impairment in social, occupational, or other areas of life



➤ Post Traumatic Stress Disorder

- 7.8% of Americans
- 30+% of veterans
- Person exposed to death, threatened death, or other form of violence
- Event is persistently re-experienced, causing trauma



➤ Major Depression



- 16 million American adults (6.9%)
- Depressed mood most of the day, nearly everyday
 - Feelings of sadness, emptiness, hopelessness
 - Diminished interest or pleasure in all or almost all activities

➤ Bipolar Disorder

- 6.1 million American adults (2.6%)
- Intense emotional changes
 - Manic and depressive
 - Extreme highs and lows



➤ Schizophrenia

- 2.4 million American adults (1%)
- Chronic disorder characterized by disturbances in thought, perception, and behavior
 - Delusions
 - Hallucinations
 - Disorganized speech



➤ EEOC Statistics

- 56% increase in depression-related EEOC workplace discrimination claims from 2003 to 2013
- 200+ disability discrimination lawsuits filed by the EEOC between 2011 and 2015
 - \$52 million recovered



➤ EEOC Statistics (cont'd)

ADA Charges Filed in 2015 by Mental Impairment

	2011	2012	2013	2014	2015
Total ADA Charges Filed	25,742	26,379	25,957	25,369	26,968
Anxiety Disorder	1362 – 5.3%	1609 – 6.1%	1662 – 6.4%	1795 – 1.7%	1934 – 7.2%
Autism	51 – 0.2%	54 – 0.2%	53 – 0.2%	63 – 0.2%	70 – 0.3%
Depression	1837 – 7.1%	1755 – 6.7%	1837 – 7.1%	1769 – 7.0%	1837 – 6.8%
Manic Depressive Disorder	861 – 3.3%	836 – 3.2%	884 – 3.4%	755 – 3.0%	816 – 3.0%
Other Psychological Disorders	436 – 1.7%	411 – 1.6%	415 – 1.6%	362 – 1.4%	389 – 1.4%
Post Traumatic Stress Disorder	593 – 2.3%	699 – 2.6%	729 – 2.8%	797 – 3.1%	941 – 3.5%
Schizophrenia	144 – 0.6%	101 – 0.4%	99 – 0.4%	93 – 0.4%	91 – 0.3%
Total Mental Health Charges Filed	5,233 – 20.5%	5,465 – 20.8%	5,679 – 21.9%	5,634 – 16.8%	6,078 – 22.5%

➤ FMLA



➤ What Does the FMLA Provide?

- 12 work weeks of leave within a 12-month period
- 26 work weeks to care for a covered service member
- Leave can be intermittent (1 day or 1 hour)
- Continued health benefits
- Reinstatement to the same or equivalent position



➤ Why Can Employees Take Leave?

- Serious health condition
 - Employee's own condition
 - To care for spouse, parent, or child with a serious health condition
- Birth, adoption or placement of a child for foster care
- Care for a covered service member or qualifying exigency



➤ “Serious Health Condition”

- Condition involving inpatient care, including any follow-up treatment or recovery period
- Condition of incapacity for 3+ consecutive calendar days and continuing treatment
- Chronic, long-term or permanent condition that requires periodic treatment
- Treatment needed to prevent a serious health condition
- Condition caused by pregnancy or prenatal care

➤ “Serious Health Condition” (cont’d)

- Mental health issues often qualify
 - Brock v. United Grinding Techs. (S.D. Ohio 2003)
 - Course of anti-depressants and anti-anxiety medications can constitute continuing treatment
- But they must satisfy the statutory definition
 - Hoban v. WBNCC JV (E.D. Mich. 2007)
 - Plaintiff missed 4 days after brother’s death, claiming he was a “nervous wreck” but never sought treatment
 - No FMLA claim: absent a diagnosable serious health condition, bereavement leave does not qualify

➤ Employee Notice Requirements

- Employees need not expressly assert FMLA when they first ask for leave
- But must explain reasons for leave to allow employer to determine whether FMLA applies
- If in doubt, employer must “inquire further”
- If applicable, provide Eligibility and Rights and Responsibilities Notices

➤ Employee Notice?

- Miles v. Nashville Elec. Serv. (6th Cir. 2013)
 - Employee suffered psychotic break and took FMLA leave
 - The day after returning to work, employee informed her supervisor that she would not be coming back to work and submitted a resignation letter
 - Court found that employer did not have a duty to inquire further as to whether employer was requesting additional FMLA leave, or to reinstate her when she sought to rescind her resignation

➤ Employee Notice?

- Kobus v. Coll. of St. Scholastica, Inc. (8th Cir. 2010)
 - Employee told supervisor that he needed a “mental health leave” to deal with head and neck pain caused by stress and anxiety
 - Supervisor “prudently” asked whether employee was requesting FMLA leave
 - When told a doctor would have to provide a certification, employee replied, “I don't have a doctor. Is there any other way I can go?”
 - When supervised that no other leave was available, employee resigned
 - Court held that employee failed to adequately state an intent to take FMLA leave

➤ Covered by the FMLA?

- Employers with 50+ employees in 20+ work weeks a year
- Employees who have worked
 - With the employer for a year or more;
 - 1250+ hours within the past 12 months; AND
 - At a site within 75 miles of which the employer has 50+ employees



➤ FMLA Abuse?

- Moran v. Redford Union School Dist. (E.D. Mich. 2009)
 - Employee needed two days off for Florida trip
 - Employer denied request for leave
 - Employee then went to doctor, was diagnosed with “acute situational anxiety,” and submitted FMLA paperwork
 - Employee would not cooperate with employer’s requests for additional medical information or sign last chance agreement
 - Court held that employee’s obstruction supported termination after refusal to sign agreement
 - BUT “there is nothing plainly inconsistent about traveling to Florida while . . . suffering from “acute situational anxiety”

➤ FMLA Abuse?

- Nelson v. Oshkosh Truck Corp. (E.D. Wis. 2008)
 - Employee suffered from migraines and anxiety
 - Employer became suspicious when employee physically delivered work restriction (3 weeks' leave) after calling in
 - Surveillance video showed employee driving, shopping, walking, standing, changing a tail light, carrying items
 - Certification indicated employee was unable to perform employment functions such as standing, sitting, walking, moving her arms, lifting, and speaking
 - At employer's request, doctor clarified that employee's ability to stand, carry, sit, speak, etc. was unpredictable due to mental illness and medication side effects
 - Employer terminated employee for false claim

➤ FMLA Abuse?

- Nelson v. Oshkosh Truck Corp. (E.D. Wis. 2008) (cont'd)
 - Court denied defendant's motion for summary judgment
 - Doctor's clarification indicates that employee's observed activities were not inconsistent with her limitations
 - Jury could conclude that termination decision was based on:
 - Employer's honest belief that employee had abused her leave
 - OR the opportunity to get rid of an employee with a chronic mental illness whom it regarded as unreliable

➤ Curbing FMLA Abuse

- Require certifications
- Authenticate/clarify certifications
- Update job descriptions
- Require use of PTO/vacation
- Require efforts to schedule treatment to minimize disruption
- Require compliance with call-in procedures, unless medical certification says otherwise

➤ Medical Certification

- Health care provider's contact information and practice/specialization
- Approximate date on which the serious health condition began, and its probable duration
- Medical facts, such as symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, or any other continuing treatment

➤ Medical Certification

- Information to establish:
 - Necessity of leave
 - Likely duration of leave
 - Estimated dates and frequency of leave if seeking intermittent leave or reduced schedule



➤ Recertification

- Can request recertification only every 30 days or minimum duration of condition unless:
 - Employee requests extension
 - Circumstances change
 - Employer doubts continuing validity of certification
- Cannot require doctor's note for each absence confirming relation to FMLA-qualifying condition
- Can request recertification every 6 months even if condition could last longer
- Can get a new certification ever year
 - Second or third opinion?
 - Still eligible?

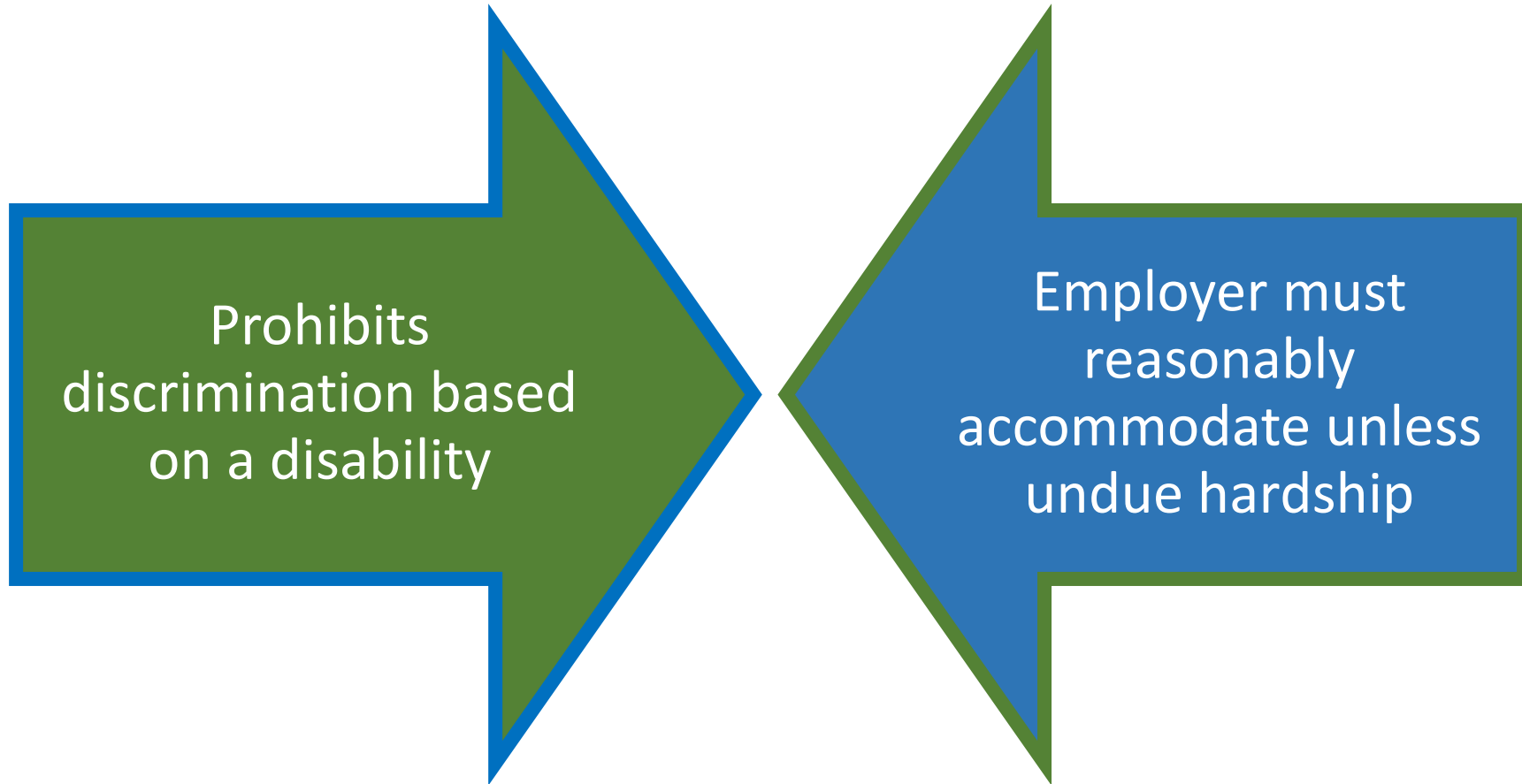
➤ Don't Retaliate!!

- Gordon v. U.S. Capitol Police (D.C. Cir. 2015)
 - Officer granted intermittent leave for depression treatment
 - Employer then:
 - Required fitness for duty test despite lack of performance issues
 - Took away gun while test was pending
 - Put her on desk duty with no OT
 - Required doctor's notes for each intermittent leave
 - Trial court dismissed interference claim
 - Appellate court reversed and reinstated plaintiff's claim

➤ ADA



➤ ADA



➤ “Disability”

- A physical or mental impairment that substantially limits one or more major life activities;
- A record or previous history of such impairment; or
- Being “regarded as” having a disability



➤ ADAAA

- Did not change the definition of disability
- Mandates liberal interpretation of “substantially limits”
 - Not meant to be a demanding standard
 - Should not require extensive analysis
 - Need not prevent, or significantly or severely restrict, the performance of a major life activity
 - Need not limit more than one major life activity

➤ ADAAA (cont'd)

- Expanded the range of “major life activities”
 - Eating
 - Sleeping
 - Concentrating
 - Lifting and bending
 - Learning
 - Reading
 - Thinking
 - Standing
 - Communicating



➤ ADAAA (cont'd)

- New list of impairments that will meet the definition of disability in “virtually all cases” which includes:
 - Major depression
 - Schizophrenia
 - PTSD
 - Bipolar Disorder
 - OCD
- Impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active

➤ What is Not Considered an Intellectual Disability?

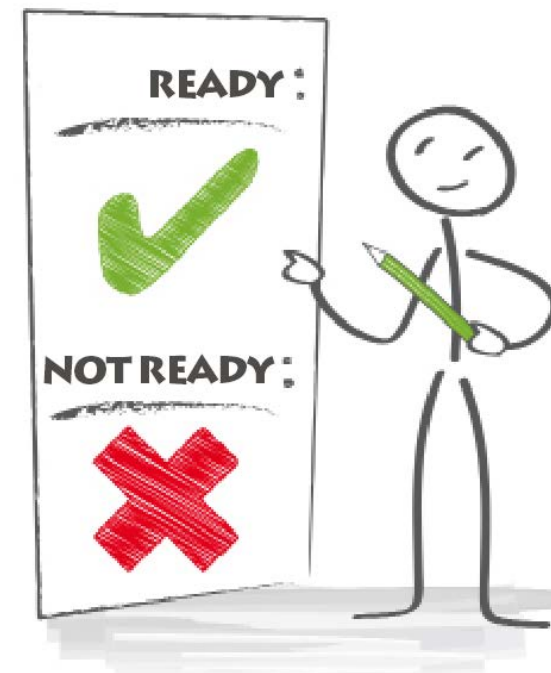
- Normal sadness or grief brought on by a traumatic event that is expected to pass with time
- Temporary anxiety due to change in circumstances at work or home
- Personality conflicts with co-workers
- Appropriate stress caused by work
- ADA specific exclusions: kleptomania, pedophilia, pyromania, compulsive gambling, etc.

➤ Accommodation Request?

- Employee requests time off because he is “depressed and stressed” – accommodation request?
 - EEOC: Yes, but assuming employee's need for accommodation is not obvious, employer may ask for reasonable documentation concerning employee's disability and limitations
 - Wells v. Winnebago Cty., Ill. (7th Cir. 2016): Mere reference to anxiety insufficient if employee fails to link that anxiety to a qualifying disability when requesting accommodation

➤ Is the Employee Qualified?

- Employee must be able to perform the essential functions of the job with or without a reasonable accommodation
- Essential functions based on:
 - Job descriptions
 - Performance evaluations
 - Time spent performing the function
 - Consequences of not performing the function
 - Experiences of employees
 - Judgment of the employer



➤ Handling Stress

- Mayo v. PCC Structural (9th Cir. 2015)
 - Welder with major depressive disorder
 - Caused him to threaten to kill his co-workers in chilling detail on multiple occasions
 - Not qualified: “essential function of almost any job is the ability to handle stress and interact with others”



➤ Working Well with Others

- Walz v. Ameriprize Financial (8th Cir. 2015)
 - Analyst with bipolar disorder
 - Caused her to interrupt meetings, disturb coworkers, disrespect supervisor
 - Not qualified: ability to work well with others was essential function

➤ Attendance

- Williams v. AT&T Mobility Servs. (6th Cir. 2017)
 - Call center rep with depression and anxiety disorder
 - Not qualified given her history
 - Long leaves for treatment
 - Unpredictable leaves due to anxiety attacks after customer calls
 - Needed to be physically present and logged into her computer to answer calls
- EEOC guidance takes opposite position: attendance is not an essential function

➤ Is the Accommodation Reasonable?

- If the accommodation is easy, just do it, don't ask questions, don't call it an accommodation
- If not, engage in full interactive process to determine disability and possible accommodations
- Once accommodation(s) are narrowed, determine whether they constitute an undue hardship
- Document, document, document!



➤ Possible Accommodations

- Schedule modifications
 - Eliminating or rotating shifts
 - Extra time off at lunch or other times during the day
- Job modifications
 - Reassignment of marginal tasks to other workers
 - Reassignment to vacant positions
- Environmental modifications
 - Putting up office partitions or providing an office with a door

➤ Rescinding Discipline

- EEOC Guidance
 - Employee with bipolar disorder
 - Responds to supervisor's criticism by becoming angry, yelling and cursing
 - Terminated for insubordination
 - Apologizes and requests reinstatement and permission to leave if she feels that stress may cause her to act inappropriately
 - Employer need not rescind termination because accommodation request came after insubordination

➤ Reassignment

- Belton v. Dep't of Veterans Affairs (EEOC 2013)
 - Anxiety and depression
 - Symptoms exacerbated by supervisor
 - No obligation to reassign employee to new supervisor
- Bradford v. City of Chicago (7th Cir. 2005)
 - Mental condition aggravated by specific co-workers
 - Not entitled to reassignment away from co-workers

➤ Reassignment

- Lawler v. Peoria School District (7th Cir. 2016)
 - Plaintiff with PTSD prior to employment
 - Student injured her and “retriggered” her PTSD
 - Requested a transfer to classroom with fewer students with severe behavioral and emotional disorders
 - District refused
 - Failure to accommodate
 - The short term leave of 2 weeks did not address her psychologist’s concerns that the PTSD was aggravated by working with students with severe behavioral and emotional issues
 - A transfer could have been accommodated
 - Failure to engage in interactive process
 - The school failed to consider transferring the teacher

➤ Teleworking

- Humphrey v. Memorial Hospitals (9th Cir. 2001)
 - Medical transcriptionist with OCD
 - OCD caused unreliable attendance
 - Work-at-home arrangement may be reasonable accommodation



➤ Teleworking

- Mason v. Avaya Comm'ns (10th Cir. 2004)
 - Plaintiff developed PTSD after witnessing murder of several co-workers
 - Co-worker pulled out a knife during argument at work
 - Plaintiff asked to work from home
 - Employer refused because physical presence was an essential function
 - Accommodation not reasonable: supervision and teamwork were essential functions

➤ Leave

- EEOC Guidance says leave may be a reasonable accommodation for a mental health condition
- Is leave reasonable if:
 - Unpredictable? Maybe
 - Long-term? Maybe
 - Indefinite? No
 - Paid? No, unless available



➤ Service Animal

- EEOC v. Direct Optical (E.D. Mich.)
 - Optician with generalized anxiety disorder
 - Requested to bring her dog to work
 - Alerted her to oncoming panic attacks
 - Helped alleviate symptoms during a panic attack
 - Retrieved her medical bag
 - Guided her to the exit
 - Employer denied her request and ultimately discharged her
 - \$53,000 settlement

➤ Don't Discriminate!!

- EEOC v. Gannett Company (D. Az.)
 - Support analyst took leave for bipolar disorder
 - Previously exceeded expectations and was up for a promotion
 - When she returned the company discharged her
 - \$50,000 settlement

➤ Final Thoughts...

- Mental health issues are pervasive
- Don't play doctor and don't ask about mental health
- Be alert and recognize requests for FMLA leave or an ADA accommodation
- Begin interactive process immediately and document it



➤ Final Thoughts...

- Be open and flexible when you consider various accommodations
- Maintain confidentiality
- Take necessary action if an employee poses a direct threat to self or others
- When in doubt, call an attorney



THANK YOU

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